SAME-SEX MARRIAGES ISSUES

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I. INTRODUCTION.

The United States is in the midst of a rapid and dramatic change of cultural mores and laws governing same-sex marriages. The Texas Constitution and Family Code prohibit same-sex marriage in Texas and deny recognition in our State to same-sex marriages created elsewhere. Those Texas laws have been held unconstitutional by a Federal District Judge in San Antonio, whose decision is stayed pending resolution of the appeal to the U.S. Court of Appeals for the Fifth Circuit. These laws have also been declared unconstitutional by a Bexar County district judge, whose decision is on appeal to the San Antonio Court of Appeals. A Dallas County District Judge previously declared the laws to be unconstitutional, but that decision was reversed by the Dallas Court of Appeals, whose decision in turn is under submission to the Texas Supreme Court. A Travis County district judge granted an agreed same-sex divorce, and the Austin Court of Appeals ruled it could not be appealed. That decision also is under submission to the Texas Supreme Court.

At this moment in time (February, 2015), the preeminent question is whether the validity of a marriage is a question of state law or Federal law. If Federal law, then all states will be required to create same-sex marriages and to recognize the validity of same-sex marriages celebrated elsewhere. If Federal law does not control the question, then the validity of a marriage will continue to be governed by state law, and the question becomes "which state's law?" State laws on same-sex marriage differ, some specifically authorizing same-sex marriage, some disallowing it but allowing civil unions instead, some explicitly banning same-sex marriage, and some making no statement for or against same-sex marriage. Some states which ban same-sex marriage do so by legislation alone, and some (like Texas) by constitutional amendment and legislation.

II. IS RECOGNITION OF SAME-SEX MARRIAGE REQUIRED BY THE 14TH AMENDMENT?

A. OVERVIEW.

The validity of a marriage in the USA has historically been a question of state law.[1] Recently, however, litigants have successfully argued that the 14th Amendment to the U.S. Constitution requires states to grant same-sex marriages and to recognize as valid same-sex marriages that were created elsewhere. The winning argument couples U.S. Supreme Court precedent recognizing that the right to marry is a fundamental right with Supreme Court precedent that the 14th Amendment's equal protection and due process of law clauses invalidate

state laws that impinge on the fundamental right to marry, and to lead to the conclusion that choosing a spouse, even of the same gender, is a fundamental right.

The Federal Courts of Appeals are falling in line with the view that the 14th Amendment preempts state laws that refuse to recognize the validity of same-sex marriage, with the notable exception of the 6th Circuit which ruled the other way, and not including the 5th Circuit (Texas, Louisiana and Mississippi) which has several such cases under advisement. The U.S. Supreme Court has avoided the question several times, but shortly before this article was written the Supreme Court granted review of the 6th Circuit Court of Appeals' decision to allow Tennessee, Kentucky, Ohio and Michigan to continue to enforce laws that bar recognition of same-sex marriages.

On January 6, 2014, the U.S. Supreme Court denied certiorari in three cases where U.S. courts of appeals had invalidated state constitutions and statutes that denied the validity of same-sex marriages. The result was to leave in place circuit court decisions invalidating such laws in West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming.

B. FEDERAL COURT CASES.

1. U.S. Supreme Court Decisions.

a. Baker v. Nelson.[2] In *Baker v. Nelson*, the U.S. Supreme Court considered an appeal from the Minnesota Supreme Court, which had rejected a claim that a Minnesota law banning same-sex marriage violated the U.S. Constitution. The U.S. Supreme Court dismissed the appeal "for want of substantial federal question."

b. ***Hollingsworth v. Perry.***[3] After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, California voters passed a ballot initiative known as Proposition 8, amending the California Constitution to define marriage as being a union between a man and a woman. Some same-sex couples brought suit in Federal district court in California to declare the state constitutional provision unenforceable. The Federal district judge declared that the constitutional provision violated the Fourteenth Amendment's Equal Protection and Due Process of Law Clauses. The U.S. Court of Appeals for the Ninth Circuit certified a question to the California Supreme Court asking whether the appellants had standing to appeal. The California Supreme Court said "yes." The Ninth Circuit then considered the merits, and affirmed the district judge's ruling, invalidating the provision in the California constitution. On June 26, 2013, in a 5- to-4 vote, in *Hollingsworth v. Perry*[4], the U. S. Supreme Court held that, because the court order did not grant or deny relief to or against the intervenors, as a matter of Federal law the intervenors had no standing to appeal the case. The U.S. Supreme Court vacated the Ninth Court of Appeals' decision and dismissed the appeal, leaving the Federal District Court's ruling standing unreviewable and the California constitutional provision unenforceable.

c. ***U.S. v. Windsor.***[5] On June 26, 2013, in *U.S. v. Windsor*, the U.S. Supreme Court declared Section 3 of the Defense of Marriage Act of 1996 ("DOMA") unconstitutional. The Majority Opinion was written by Justice Kennedy, who sided with the Court's four "liberal"

judges. The Court held that it was unconstitutional for the Federal government to refuse to recognize a marriage between persons of the same sex when that same-sex marriage was recognized under the law of the state where the parties reside. The Supreme Court did *not* rule that states are required to permit same-sex marriages or that states are required recognize same-sex marriages originating elsewhere. The Texas law that courts must ignore same sex marriages is still in force.

Although Justice Kennedy attributed DOMA to an indefensible bias on the part of Congress against gays and lesbians, the legal basis for the decision was not that such discrimination was unlawful but rather that principles of federalism protected the States' right to regulate marriage without interference from Congress. Justice Kennedy's Opinion promulgated the rule that the law of the state of *residence* controlled the validity of a marriage. This outcome was not very satisfactory to proponents of marriage equality, who would have preferred that the law of the *place of celebration* be determinitive.

2. U.S. Court of Appeals

a. *Herbert v. Kitchen* (10th Circuit**)**.[6] On June 25, 2014, a panel of the Court of Appeals for the 10th Circuit held a Utah law banning same-sex marriage to be unconstitutional. On July 18, 2014, in *Bishop v. Smith*, a panel of that same Court of Appeals held that Oklahoma's law banning same-sex marriage was unconstitutional. The U.S. Supreme Court denied certiorari in both cases on October 6, 2014.

b. *Bostic v. Schaefer* (4th Circuit).[7] On July 28, 2014, a panel of the U.S. Court of Appeals for the 4th Circuit ruled 2-to-1 that a Virginia law banning same-sex marriage was unconstitutional under the Fourteenth Amendment's due process and equal protection clauses. The court applied strict scrutiny review. The U.S. Supreme Court denied certiorari on October 6, 2014.

c. *Baskin v. Bogan* (7th Circuit).[8] On September 4, 2014, the U.S. Court of Appeals for the 7th Circuit held that Indiana and Wisconsin laws that banned same-sex marriage were unconstitutional. The U.S. Supreme Court denied certiorari on October 6, 2014.

d. *Latta v. Otter* (9th Circuit).[9] On October 7, 2014, the Ninth Circuit Court of Appeals applied heightened scrutiny to Idaho and Nevada's constitutional and statutory provisions banning same-sex marriage, and found that they violated the Fourteenth Amendment. On January 9, 2015, the combined court denied rehearing en banc, with three justice dissenting.

e. *DeBoer v. Schneider* (6th Circuit).[10] On October 7, 2014, a three- justice panel of the U.S. Court of Appeals for the Sixth Circuit, by a 2-to-1 vote, upheld Michigan, Ohio, Kentucky and Tennessee constitutional provisions and statutes preventing same-sex marriages and refusing to recognize such marriages from elsewhere. On January 16, 2015, the U. S. Supreme Court consolidated this case with three others and granted certiorari.

f. *De Leon v. Perry*,[11] *Mississippi's Campaign for Southern Equality v. Bryant*,[12] *Robicheaux v. Caldwell*[13] (5th Circuit). The Court of Appeals for the 5th Circuit held oral argument on January 9, 2015, in three cases where Federal district judges had ruled on the constitutionality of state laws banning same-sex marriage. On February 26, 2014, in the Texas

Federal District Court case, *De Leon v. Perry*, Judge Orlando Garcia declared the Texas law banning same-sex marriages unconstitutional. Judge Garcia stayed the effect of his ruling through appeal to the Fifth Circuit Court of Appeals. The case was orally argued to the Fifth Circuit on January 9, 2015. No ruling has been issued by the time this article was written.

g. *Brenner v. Armstrong* (11th Cir.).[14] The Court of Appeals for the 11th Circuit has pending a Florida Federal district court's ruling that the same-sex marriage ban in Florida law is unconstitutional. The U.S. Supreme Court refused to grant a stay of the district court's ruling on December 19, 2014 (Scalia and Thomas, dissenting). The district court's stay expired on January 6, 2015, and same-sex marriages are now being performed in Florida.

III. IF THE 14TH AMENDMENT DOES NOT CONTROL, IS FULL FAITH AND CREDIT REQUIRED FOR SAME-SEX MARRIAGES?

If there is no 14th Amendment basis to force states to permit and recognize same-sex marriages, then the question arises whether the Full Faith and Credit Clause of the U.S. Constitution requires each state to acknowledge the validity of same-sex marriages and civil unions that are validly created under the law of any other American state. If the same-sex marriage was created under the law of a foreign country, full faith and credit does not apply and a court would have to rely on some U.S. treaty to preempt state law on the issue, or rest such recognition on the doctrine of comity. An analysis of how the Full Faith and Credit Clause argument for same-sex marriages may affect future litigation can be found in my article "Same-Sex Marriages and Gender Identity Issues."[15]

IV. CHOICE OF LAW ISSUES.

If the Fourteenth Amendment does not require all states to recognize a same-sex marriage validly created in one state, and if full faith and credit for a same-sex marriage lawfully established in another state is not required, there is the question of whether Texas choice-of-law rules import the law of other states or nations into a Texas court proceeding. Generally speaking, there are three places whose law could be applied to the validity of a same-sex marriage: (i) the law of the parties' domicile at the time of marriage; (ii) the law of the place of celebration of the marriage; (iii) the law of the forum where the lawsuit is filed. An analysis of how choice-of-law rules may apply to same-sex marriages can be found in my article "Same-Sex Marriages and Gender Identity Issues."[16]

V. TEXAS LAW ON SAME-SEX MARRIAGE.

A. THE TEXAS FAMILY CODE.

When Title 1 of the Family Code was first enacted in 1969, Section 1.91 provided that "the marriage of a man and woman may be proved "by evidence of an informal marriage. Section 1.01 said that "[p]ersons desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state." The statute was amended in 1973 to say "A man and a woman desiring to enter into a ceremonial marriage . . . ." The statute is carried

forward in current Family Code Section 2.001, which also contains a prohibition against issuing a marriage certificate to persons of the same sex. In 2003, the Texas Legislature enacted Section 6.204 of the Family Code, which reads:

§ 6.204. Recognition of Same-Sex Marriage or Civil Union.

(a) In this section, "civil union" means any relationship status other than marriage that:
  (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
  (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:
  (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
  (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Added by Acts 2003, 78th Leg., ch. 124, § 1, eff. Sept. 1, 2003.

B. THE TEXAS CONSTITUTION.

On November 8, 2005, Texas voters passed a constitutional amendment, by a vote of 76% to 24%, forbidding the creation or recognition of same-sex marriage. The provision reads:

Sec. 32. MARRIAGE.

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

With the amendment, it can no longer be argued that refusing to recognize same-sex marriage or civil unions violates the Texas Constitution. The only recourse to proponents of same-sex marriage in Texas is preemption by Federal law, based either on the fundamental right to marry coupled with the Fourteenth Amendment's Equal Protection or Due Process of Law Clauses, or the Full Faith and Credit.

C. TEXAS COURT DECISIONS.

In *Ross v. Goldstein*,[17] the appellate court declined to recognize an equitable remedy in probate recognizing a "marriage-like relationship" doctrine. The court cited a Texas Legislative Resolution saying that "[t]his state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly

appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage."

In the case of *Mireles v. Mireles*,[18] the appellate court said that "[a] Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."

In the case of *In re Marriage of J.B. and H.B.*,[19] the Dallas Court of Appeals held that a Texas court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts. The opinion held that that the State of Texas, through the Attorney General, had the right to intervene in the lawsuit to raise the trial court's lack of jurisdiction, and that mandamus would lie to overturn the trial court's dismissal of the AG's intervention. The appellate court also ruled that, because of Family Code Section 6.204, the trial court had no subject matter jurisdiction over the purported divorce proceeding involving a same-sex marriage.[20] The appellate court held that in Texas same-sex marriages are void, meaning that they have no legal effect.[21] This case was consolidated by the Texas Supreme Court with *State v. Naylor*[22] and was argued to the Supreme Court on November 5, 2013.

In *State v. Naylor*, the Austin Court of Appeals ruled that the State of Texas did not have standing to appeal a divorce between two women who were legally married in Massachusetts, that was granted by a Travis County District Judge based on an agreement between the parties. The Court also said that Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case."[23] On March 21, 2011, the State filed a petition for review[24] in the Texas Supreme Court, and on March 25, 2011 the State filed a petition for mandamus as well. Briefs were filed, including numerous amicus curiae briefs. On July 3, 2013, the Clerk of the Supreme Court asked the parties to submit additional briefs on the impact if any of the U.S. Supreme Court's decision in *U.S. v. Windsor*. On Friday, August 23, 2013, two years and five months after the case was filed, the Supreme Court granted review. This appeal and mandamus were both consolidated with the appeal in *In the Matter of the Marriage of J.B. and H.B.* and they were all argued on November 5, 2013.

D. TEXAS ATTORNEY GENERAL OPINIONS.

On December 16, 1999, Texas Attorney General John Cornyn (now a U.S. Senator) issued an AG's Opinion that county clerks were not required or permitted to accept for filing a "declaration of domestic partnership."[25] On October 27, 2005, Texas Attorney General Abbott sent a letter to a Texas Senator and a State Representative, on the subject of the then-proposed constitutional amendment relating to same-sex marriage. General Abbott said that the proposed amendment "would in fact safeguard traditional marriage in Texas."

On November 2, 2012, State Senator Dan Patrick sent a letter to Attorney General Abbott asking about the legality of certain government entities offering benefits to "domestic partners" of government employees. Senator Patrick listed El Paso County and Travis County, and the cities of Fort Worth, Austin, San Antonio, and El Paso. Several school districts had also had adopted similar policies. On April 29, 2013, Texas Attorney General Abbott issued Opinion GA-1003, which concluded that Texas cities, counties and school districts could not lawfully offer insurance benefits to domestic partners as part of their employee benefit programs. General Abbott noted that Tex. Const. Art. I § 32(b) was held to be "unambiguous, clear, and

controlling" in *Ross v. Goldstein*.[26] He found that the entities in question had essentially created a "legal status" of same-sex domestic partnership in violation of the constitutional provision.[27] In mid-2013, the City of San Antonio adopted a nondiscrimination policy against GLBT. The AG objected but did not sue over the ordinance. On February 4, 2014, Bexar County adopted a policy extending health insurance benefits to unmarried companions of employees, with no specification of gender.

VI. CONCLUSION

The Fifth Circuit may rule before or during the summer on whether Texas law banning same-sex marriage is unconstitutional. If they find it unconstitutional, then Texas law is unenforceable unless the Supreme Court overturns that decision. If the Fifth Circuit upholds Texas law, then Texas will await further action from the U.S. Supreme Court. The U.S. Supreme Court is expected to rule before September on whether the 14th Amendment requires all states to grant same-sex marriages and recognize same-sex marriages from elsewhere. If the Supreme Court invalidates all state laws against same-sex marriage, then Texas' existing laws cannot be enforced. If it says that the validity of marriage is a question of state law, then states will have a complicated layer of choice-of-law rules, and alternate theories of recovery between same-sex couples, to deal with in Texas. I plan to address the outcome and consequences of both of these cases in a follow-up article for the Winter 2016 Issue of *In Chambers*.

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[1] *In re Burris*, 136 U.S. 586 (1890) ("The whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States"); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) ("when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States").
[2] *Baker v. Nelson*, 409 U.S. 810 (1972).
[3] *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).
[4] *Id.* (Chief Justice Roberts voting in the majority, with Justices Kennedy, Thomas, Alito, and Sotomayor dissenting).
[5] *U.S. v. Windsor*, 570 U.S. ___ (2013), 133 S.Ct. 2675 (June 26, 2013).
[6] *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2014).
[7] *Bostic v. Schaefer*, No. 14-1167, 4th Cir. (July 28, 2014).
[8] *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).
[9] *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).
[10] *DeBoer v. Schneider*, 772 F.3d 388 (6th Cir. 2014).
[11] *De Leon v. Perry*, No. 5:13-CV-00982-OLG (Texas law invalidated).
[12] *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (5th Cir. 2014) (Mississippi law invalidated).
[13] *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (2014) (Louisiana law upheld).
[14] *Brenner v. Armstrong*, No. 14-14061, 11th Cir. (Dec. 3, 2014).
[15] Orsinger, Richard. (2015, Jan. 27). *Same-Sex Marriages and Gender Identity Issues*. Paper presented at the 2015 Family Justice Conference, San Antonio, *available at https://www.yourhonor.com/myprofile/assets/ORSINGER_Same-Sex_Marriages_Gender_Identity_Issues_2015_(1-20-2014_-_2).pdf.*
[16] *Id.*
[17] *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.).
[18] *Mireles v. Mireles*, 2009 WL 884815, at *2 (Tex. App.–Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.).
[19] *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App.–Dallas 2010, pet. granted).

[20] 326 S.W.3d at 667.
[21] 326 S.W.3d at 665.
[22] *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
[23] 330 S.W.3d at 441.
[24] Petition for Review of State of Texas http://wwww.supreme.courts.state.tx.us/ebriefs/11/11011401.pdf.
[25] Opinion No. JC-0156, Re: Whether a county clerk must accept for filing a "declaration of domestic partnership" <https://www.texasattorneygeneral.gov/opinions/opinions/49cornyn/op/1999/htm/jc0156.htm>
[26] *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.).
[27] The Texas ACLU submission in support of the trial court's action is at <http://aclutx.org/download/119>.